COURT, U. S.
SEP 21 1973
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No. 73-229

In the Supreme Court of the United States

OCTOBER TERM, 1973

MARSHALL P. SAFIR, PETITIONER

v.

ROBERT W. BLACKWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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Petitioner, an owner of Sapphire Steamship Company, requested the Maritime Subsidy Board to recovery subsidies paid to certain named members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO) for their violations of Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U.S.C. 1227, by having acted in concert to reduce selected military cargo rates on certain routes in order to drive Sapphire from those routes (Pet. App. 16a-17a). The Maritime Subsidy Board then instituted an investigation to determine whether those members of AGAFBO receiving operating—differential subsidies under the Act had so violated Section 810.

On April 16, 1973, the Board issued a preliminary decision finding that all subsidized members of AGAFBO had violated Section 810, but that recovery of subsidies

was proper only from those who were in direct competition with Sapphire (Pet. App. 19a, 86a-87a). The exact amounts to be repaid were to be determined by a formula based on the volume of military cargo carried at reduced rates (Pet. App. 77a-78a), and those subject to the order to repay were given an opportunity to submit their views on the amounts recoverable (Pet. App. 87a). The order further stated (App. 87a):

> An order determining final recoveries will thereafter be issued. Upon issuance of said order on final recoveries this decision will become final.

Without awaiting the further proceedings called for by the order, or for a final decision, petitioner filed in the United States Court of Appeals for the Second Circuit a "motion" to overturn the Board's order and to require greater penalties from all respondents (Pet. App. 119a-120a).[1] The respondents opposed the motion and contended that the court of appeals lacked jurisdiction to conduct the judicial review sought by petitioner and that, in any event, such review was premature. The court of appeals denied petitioner's motion (Pet. App. 1a). Petitioner seeks review of that denial.

1. The court of appeals had no jurisdiction to review directly the order in question. Absent a specific statutory grant of jurisdiction to review orders of administrative

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[1] Petitioner's motion was filed under the caption of an earlier appeal in this unique and much-litigated matter in which the court of appeals had reversed a district court's dismissal of petitioner's complaint seeking to compel the federal respondents (or their predecessors) to institute proceedings of the type now being challenged by petitioner. *Safir* v. *Gibson*, 417 F. 2d 972 (C.A. 2). The conduct of those proceedings was also the subject of another district court challenge by petitioner and review by the court of appeals. *Safir* v. *Gibson*, 432 F. 2d 137 (C.A. 2), certiorari denied, 400 U.S. 850.

agencies, a court of appeals has no jurisdiction to entertain such an action as a court of first instance. *American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401; *Turkel* v. *Food and Drug Administration,* 334 F. 2d 844 (C.A. 6), certiorari denied, 379 U.S. 990; *Schwab* v. *Quesada,* 284 F. 2d 140 (C.A. 3); *City of Dallas* v. *Rentzel,* 172 F. 2d 122 (C.A. 5), certiorari denied, 338 U.S. 858. There is no statute conferring such jurisdiction in this case.[2]

2. In any event, the decision of the Maritime Subsidy Board of which petitioner sought review was not a final order and thus was not ripe for review. The Board itself stated that the decision would become final only after an additional order was issued. The test for finality is "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Boston Marine Terminal Association* v. *Rederiaktiebobolaget Transatlantic,* 400 U.S. 62, 71. The Board's explicitly interlocutory decision in the instant case is not final under that test. No legal consequences flow from the order, no rights or obligations have been determined finally, and judicial review would disrupt the orderly functioning of the administrative process in this case.

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[2] Indeed, jurisdiction over suits brought to recover damages arising from unjustly discriminatory or unfair practices of subsidized carriers is vested in the district courts. 46 U.S.C. 1227. No further provision is made for review of decisions of the Martitime Subsidy Board. To the extent that the Administrative Procedure Act might permit review, such a review proceeding could be initiated only in the district court. See *Rettinger* v. *Federal Trade Commission,* 392 F. 2d 452, 457 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09